

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 02.12.2016

Date of Reserving the Order	Date of Pronouncing the Order
07.10.2016	02.12.2016

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.Nos.3442 of 2016

M/s.WS Retail Services Private Limited,
Rep., by its Authorised Signatory,
Mr.Sukesh N.Shetty,
N.13, Vallalar Salai,
S.J.Modern Towers,
Kamaraj Nagar,
Puducherry.

... Petitioner

Vs

- 1.Union of India,
Through the Secretary,
Ministry of Finance,
North Block,
New Delhi - 110 001.
- 2.The Commissioner of Commercial Taxes,
Union Territory of Puducherry,
First Floor, 100 feet Road,
Ellapillaichavady, Puducherry - 605 005.
- 3.The Commercial Tax Officer-I,
2nd Floor, Room No.31,
100 feet Road, Ellapillaichavady,
Puducherry - 605 005.
- 4.The Deputy Commercial Tax Officer (Intelligence Wing),
2nd Floor, Room No.31,
100 feet Road, Ellapillaichavady,
Puducherry - 605 005.

5.The Assistant Commissioner of Commercial Taxes
LVO-015, Vanijya Therigekaryalaya -2,
Rajendranagara, Koramangala,
Bangalore - 560047, Karnataka.

6.The Sales Tax Officer,
8th Floor, E Wing,
New Vikrikarbhavan,
Old Nesbit Road,
Sardarbalwant Singh Dhodhi Marg,
New Dockyard & Byculia Railway Station,
Mazgaon, Mumbai - 400010 (Maharashtra)

7.The Value Added Tax Officer,
KCS Branch
11th Floor Sales Tax Building,
Delhi - 110 002.

8.The Excise and Taxation Officer,
Taxation Building,
Hero Honda Chowk,
Gurgaon - 122 001 (Haryana)

9.The Joint Commissioner (Sales Tax),
Barasat Charge, 82/5, KNC Road,
Barasat, 24 Prgs (North),
Kolkata - 700 124 (West Bengal)

10.The Deputy Commissioner,
Khand-7, Commercial Tax Department,
Commercial Tax Building, Collectorate,
RDC, Raj Nagar, Ghaziabad - 201002.
Uttar Pradesh

... Respondents

Prayer :-This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records comprised in impugned order in No.34090021317/CTO-I/2015-16, dated 19.01.2016 on the file of the third respondent and to quash the same as arbitrary, illegal and without jurisdiction.

For petitioner .. Mr.N.Venkataraman Sr., Counsel for
Mr.K.Magesh

For Respondents .. Mr.R.L.Ramani Sr., Counsel for
Ms.Reena Ishwariya AGP

ORDER

The question which falls for consideration is to whether the retail sale of mobile phones, computer spare parts, personal healthcare products, car accessories, cameras etc., done by the petitioner via the online portal www.flipkart.com would qualify as an inter-state sale or a local sale within the union territory of Puducherry.

2. The petitioner's case is that the goods meant for sale are stored by them in warehouses located in Mumbai, Kolkata, Bangalore, Delhi and Noida and on an order being placed by the customer located anywhere in the country or in particular from Puducherry, as the present controversy has arisen from Puducherry, via the online portal, the goods corresponding to the purchase order will be transported from one of the warehouses to Puducherry by way of an inter-state sale between the petitioner and the customer on which the Central Sales Tax (CST) is paid by the petitioner in the State where the goods originate in terms of the provisions of the Central Sales Tax Act, 1956, (CST Act). For the purpose of delivery of the goods within the Union Territory of Puducherry, the petitioner has installed a delivery hub in Puducherry, M/s.E-Kart logistics, a division of the petitioner. The delivery hub acts as a sorting facility to sort the deliveries based on the area/street for delivery to the customers. Therefore, the petitioner would contend that there is no sale or inventory holding transactions that are effected from the hub located in the Union Territory of Puducherry.

3. An inspection was conducted by the Intelligence Wing of the Commercial Taxes Department of Puducherry in the business premises of the petitioner on 21.10.2014, based on which a notice dated 03.11.2014, was issued to the petitioner calling upon them to register themselves under the provisions of the Puducherry Value Added Tax Act (PVAT) and furnish the details regarding the total value of the sales done from the financial year 2009-10 and pay taxes as per the PVAT Act. Further they were directed to furnish the complete details of the sales of various commodities in the Union Territory of Puducherry, furnish the purchase ledger, sales ledger, cash book, income tax etc., for the immediate preceding three years and were granted time till 20.11.2014 to furnish all the documents failing which stated that the respondent will provisionally estimate and collect tax under the provision of the PVAT. The allegation in the show cause notice was that in Puducherry, the petitioner is not a registered dealer and it was found from the copies of the E-Sugam forms utilized by the petitioner that they have used a

duplicate and non-existing TIN number for transporting their goods from the warehouses at Bangalore to delivery hubs at Puducherry and this shows that they have committed an offence. It was further alleged that the petitioner had consigned the goods from its various warehouses to the delivery hub in Puducherry and therefore, the movement of goods are inter-state sales and gets completed the moment they have been taken delivery from the carriers and that the movement gets completed when they are delivered by the Transporter at the distribution hub. Ultimately, the delivery by means of delivery box to end customer is the first sale within the Territory of Puducherry and hence, it is taxable. Further, as per E-Sugam forms both the consigner and the consignee is the petitioner and the transaction from the warehouses hub to the delivery hub is only a stock transfer. The petitioner by letter dated 28.11.2014, submitted their objections that they are engaged in the business of online sales to end customer and provides logistics services under the brand name E-Kart Logistic to the online sellers effected via flipkart.com. The petitioner currently sells goods in the course of inter-state trade and commerce to the customers in Puducherry from any one of the six warehouses in the country upon charging CST at full rate from those warehouses.

4. With regard to the allegation of using non-existing TIN number, it was stated that the form in the State of Karnataka has a provision and this is not relevant for the movement of goods to Puducherry. Further since the unregistered dealer is outside Karnataka, but within Puducherry, the petitioner has to essentially quote the respective TIN code of Puducherry and generate E-Sugam forms. Further, the petitioner encloses the manifest documents along with E-Sugam to prove the genuineness of the transaction i.e., sales to the end customers. Further, it was stated that the transaction is an inter-state sale, where the tax invoice is raised by the seller from where the goods were despatched, discharge the full applicable CST to the concerned State Government and declare the same in their periodical returns. Therefore, it is submitted that the transaction is an interstate sale. With regard to the presence of the delivery hub at Puducherry, it was submitted that in view of the business model, the petitioner has installed courier delivery hub in Puducherry and the hub acts as a sorting facilities to sort the deliveries based on the area/street to deliver to the customer and there is no sale or inventory holding transactions that are effected from such hubs located in the Union Territory of Puducherry and they are not part of VAT regime, as it is only part of a logistic/carrier business. Therefore, the petitioner requested to drop the proceedings.

5. The respondent issued another notice dated 05.02.2015, containing virtually the same allegation and stated that the

transactions, more particularly, those where payment is made on delivery of the product as interstate sale and directed the petitioner to submit their objections. The petitioner submitted their objections dated 23.02.2015, explaining the type of transaction done by them as a flowchart and sought to substantiate their case as one of interstate sale. A summon dated 31.07.2015, was issued calling upon the petitioner to produce certain documents. In response to which, a representation was made on 24.08.2015, enclosing a flowchart to explain the modus operandi of their business activities. The respondent issued a third notice, dated 13.11.2015, listing out various transactions done by the petitioner, in which a flowchart of the transactions done by the petitioner was shown under two columns one relating to transactions when the goods are not taken delivery and the other relating to transactions when the goods are taken delivery and the petitioner was called upon to file their objections to the proposals made in the said notice. The petitioner filed their objections on 30.11.2015, appending sample copies of the retail invoices etc., this was followed by a further objection dated 18.12.2015 enclosing a Chartered Accountant's certificate. After which the third respondent CTO, has passed the order dated 19.01.2016, rejecting the contentions raised by the petitioner and treating the transactions as sale within the Union Territory of Puducherry and demanding tax and levying penalty. This order dated 19.01.2016, is impugned in this Writ Petition.

6. Mr.N.Venkataraman learned Senior Counsel assisted by Mr.K.Magesh, learned counsel for the petitioner referred to the definition of interstate sale as defined under the CST Act and submitted that all the ingredients contained therein, are fully fulfilled and the respondent without considering the factual aspects, has passed the impugned order. It is submitted that what is paramount consideration in an interstate sale is movement of goods and if that is established, the test required is satisfied. The appropriation of goods has also been established and for an interstate sale, the situs of the sale is irrelevant. It is further submitted that the movement followed by sale is also an interstate sale and all that is required, is movement and sale should have an integral connection. It is submitted that three contentions have been put against the petitioner and they are primarily the reason for passing the impugned order, firstly because the products have been brought from Bangalore to Puducherry by courier on "self basis"; secondly the situs of the sale is a Puducherry, since the sale does not fructify till the consideration is paid, which is done at Puducherry and therefore, it is sale within the State of Puducherry. It is further submitted that the buyer does not choose the courier, who transport the goods and the petitioner having transported the goods on "self basis" and kept the same in their distribution hub for being sorted and distributed, the

sale has been effected only from the distribution hub at Puducherry. The learned counsel reiterated the factual averments set out in the various notices and sought to impress upon the Court that the sale of goods is outside the State of Puducherry and for logistic purpose, it is being brought to Puducherry to the distribution hub, where the product is distributed to the Customer who has purchased the product. It is further submitted that the purchase invoice is generated in the name of the purchaser in the State from which the goods moved for which full rate of CST is paid in the said relevant State. Therefore, the distribution of the goods done from the distribution hub would not amount to sale.

7. In order to demonstrate the factual matrix the learned Senior counsel referred to the flowchart which was given in the impugned order in pages 14 and 15, it is submitted that insofar as transactions where payments have been already made through credit card or other mode, the respondents have not taxed those transactions and what is being taxed is only the transactions on cash on delivery basis. By referring to the flowchart, it is submitted that the respondent accepts that the customer chooses the particular product, it is accepted that the prospective bill is made and the identified package along with other consignments is despatched to the petitioner's outlet. This shows that the respondent has accepted that the appropriation has taken place at Karnataka. The respondents harp upon the segregation and delivery done by the delivery boys in the Puducherry distribution hub. This is explained by stating that it is for segregation and purely for logistics reasons and therefore, it is submitted that the situs of the sale is not Puducherry, but when the appropriation takes place as and when the purchase invoice is drawn in the name of the purchaser. The learned counsel referred to the following decisions to demonstrate as to what are the ingredients to be satisfied to term a transaction as an interstate sale namely, Rukmini Mills Ltd vs. The Government of Tamil Nadu reported in 1975 (36) STC 425 Mad; Onkarlal Nandlal vs. The State of Rajasthan & Ors., reported in 1985 (60) STC 314 (SC); Kerala State Small Industries Development and Employment Corporation Ltd., vs. State of Tamil Nadu reported in 1999 (113) STC 169; As regard the relevancy of the situs, reliance was placed on the following decisions in the case of Indian Oil Corporation Ltd., and Anr., vs. UOI & Ors., reported in 1980 Supplementary SCC 426 para 6 & 9 and Sahney Steel and Press Works Ltd., & Anr., vs. CTO & Ors., reported in 1985 (4) SCC 173.

8. Mr. R. L. Ramani, learned Senior counsel assisted by Ms. Reena Ishwariya, learned Additional Government Pleader appearing for the respondents submitted that the petitioner is a registered dealer under the PVAT Act and engaged in the sale of consumer goods and durables through the online portal

www.flipkart.com. The buyer, who wishes to purchase a particular product logs into the website of the internet provider, www.flipkart.com and chooses a particular product of specific description. The online portal communicates such purchase intention to the petitioner firm which has godowns in six States in the country, despatches the goods to the buyer, who has made the purchase intention order. If the purchase is located in the same State, where the godown from which the goods are to be despatched to him is also located, then the petitioner treats the sale as a local sale. If the purchaser is located in some other State, the petitioner treats the sale as inter-state sale, what is relevant to note that the person who made the order never enters into any direct communication with the petitioner, as his communication is only with the online portal. Even in respect of the return of goods, due to non-satisfaction is as per the terms provided by the online portal and not by the petitioner who actually sells the goods. Thus, there is no actual direct communication between the actual buyer and actual seller and there is a complete absence of any contractual relationship between the actual buyer and the actual seller within the meaning of Indian Contract Act, 1872 and the Sales of the Goods Act, 1930. Therefore, in the absence of any direct communication between the actual buyer and the actual seller and in the absence of proper offer by the actual seller to the potential buyer and the acceptance of the actual buyer to such offer and communication of the same to the seller, the movement of goods from the originating State to the destination State should not be treated as a sale within the meaning of Section 3 (a) of the CST Act.

9. Insofar as the transactions where the product is delivered at the doorstep of the buyer on cash on delivery basis, the movement of goods from one State to another is not the result of any contract of sale between the actual buyer and the actual seller. Therefore, it is submitted that the order passed by the Assessing Officer is just and proper. The learned Senior Counsel for the revenue raised preliminary contention as regards the maintainability of the writ petition as the petitioner has an alternative remedy under the provisions of the PVAT Act. Thus, it is the submissions of the learned Senior counsel that there is no express or implied contract between the buyer and the petitioner and the movement is independent of the contract of sale, as the latter does not exist, the sale effected by the petitioner cannot be construed as an inter-state sale.

10. With regard to the plea of appropriation, it is submitted that the person making the order without any communication either to the petitioner or the portal does not mean that the goods are appropriated to the sale transaction in the originating State and movement of goods from the originating

State to the consumer in Puducherry cannot be regarded as an inter-state sale. On the other hand, the transaction has all the elements of stock transfer. The factual situation is that the goods are transported from godowns in one State to godowns in other State including Puducherry, goods are transported in bulk from godown in one State to godown in another State and the transport documents mentions the consignor and the consignee, as the same person, that is the petitioner. The movement of goods is triggered on the expectations of possible sale and not on account of contract of sale and it will not partake the character of inter-state sale. It is further submitted that the registration obtained by the petitioner under the PVAT Act is only for courier and logistic operations and the provisions of the Act does not require a registration, if the petitioner is performing only the services of courier parcel agency.

11. So far as the decision of the Kerala High Court, which has been relied on by the petitioner in the case of the Flipkart Internet & Ors., vs. State of Kerala in W.P.(C).No.5348 of 2015, dated 20.10.2015, the Court has observed that due to uncertainty with regard to the real nature of transaction in question for instance whether transaction is an intrastate sale or in interstate sale, Intelligence Officer ought ideally, to refer the matter to the Assessing Officer's concern to arrive at a finding. In the said case, Flipkart, was the petitioner and it was the portal which did not have any title to the goods and was only registered as a service provider, that was treated as a dealer and tax imposed on it under the Kerala VAT Act. However the petitioner herein is the dealer engaged in purchase and resale of goods, on whom tax is sought to be imposed. Further in the decision of the Kerala High Court, no opinion has been rendered regarding the determination of the sale, as an interstate sale as contended by the petitioner and the observation is to the effect that when there is an confusion in determining the character of the sale, the Assessing Officer alone is entitled to pass orders, which has been followed in the present case. It is further submitted that it has been clearly established that the goods are within the Union Territory of Puducherry at the time of contract of sale, as a contract comes into an existence only at that place and time, where the ultimate customer decides to take the final delivery of the product and pay for the sale and this event happens in Puducherry and therefore, the transaction ought to be taxed under Section 14 read with Section 22 of the PVAT Act. The learned counsel referred to the copy of the consignment note to show that both the consigner and the consignee is the petitioner, copy of the E-Sugam forms to demonstrate that the non-existing TIN number has been given by the petitioner, which is an offence.

12. In reply, the learned Senior counsel submitted that the second respondent has acted without jurisdiction and sought to impose VAT on inter-state transaction, which has already been subjected to CST in a manner, which is clearly ultra vires the PVAT Act and also violative of the taxing powers under Article 246 read with VII Schedule to the Constitution of India and therefore, the petitioner has approached this Court by way of this Writ Petition. Further, the action of the second respondent seeking payment of VAT on such transactions runs counter to the said position in law as upheld by the various decisions of the Hon'ble Apex Court and the High Court wherein it has been held a sale qualifies as interstate sale if it is occasioned the movement of goods from one State to another. Therefore, when there is a total lack of jurisdiction, as held by the Hon'ble Supreme Court in WhirlPool Corporation vs. Registrar of Trade Marks, Mumbai & Ors., reported in AIR 1999 SC 22, the Writ Court is entitled to intervene and quash the proceedings and any alternate remedy is not a bar in case of inherent lack of jurisdiction. It is further submitted that the transaction done by the petitioner is not a stock transfer, but an inter-state sale and taxes have been paid by the petitioner in the State from where the goods had occasioned movement. The respondent seeks to split the transaction/movement of goods into two parts, movement of goods from warehouse in the originating State to the delivery hub to Puducherry is being alleged to be a stock transfer and the subsequent movement from delivery hub in Puducherry to the customer in Puducherry is alleged to be a local sale liable to VAT in Puducherry. However, the undisputed fact is the customer first places an order on the petitioner via the website www.flipkart.com and pursuant thereto, the goods are earmarked for the order placed in the originating state, the sale invoices is raised in the originating State and goods are despatched from the warehouses in the originating State to Union Territory of Puducherry, where they are delivered to the customer within Puducherry. The petitioner never stocks the goods for sales in Puducherry and the goods are brought to the delivery hubs only for onward delivery to the customer. The goods are already appropriated to the customer and despatched from the originating State based on the order placed by the customer and in order to fulfil such an order, the goods are moved to Puducherry. Thus, there can be no doubt that the movement of goods is pursuant to and occasioned by the order for purchase placed by the customer and the transaction qualifies as an inter-state sale, which is taxable only under the CST Act and not PVAT Act. It is submitted that three tests have to be satisfied for an inter-state sale namely, (1) there must be a sale of goods; (2) goods covered by the sale must actually moved from one State to another; and (3) the sale and the movement must be part of the same transaction, both arising from the same contract or as incidental thereto. In the instant case all the three conditions are satisfied. Further, it is submitted that

the presence of the intermediary such as the sellers own representation or warehouses would not alter the nature of the transaction, which remains that of an interstate sale liable to CST. Thus, in the instant case, since the goods entering are specifically earmarked for the customers, who are already placed their order on the petitioner through the online portal, the transaction clearly constitutes an inter-state sale liable to CST. It is reiterated that the movement of the goods from the warehouses in the other State to Puducherry is not independent to the sale inasmuch as the goods are appropriated the sale transaction in the originating State and there is an inextricable link between the movement of goods from the other State and sale to the customers in Puducherry. Merely because, the buyer has a right to reject the goods, it does not mean that the interstate movement of goods is independent to the transaction of sale, as, but for the order placed by the buyer, the petitioner would not have moved the goods from outside of Puducherry into Puducherry. On the above submissions, the learned counsel sought for setting aside the impugned proceedings.

13. The preliminary objection raised by the Revenue is regards the maintainability of the Writ Petition on the ground that the petitioner has an effective alternative remedy under the PVAT Act. However, since the petitioner has raised the question of jurisdiction of the second respondent in passing the impugned order in taxing transactions claimed as interstate sale by levying tax under the PVAT Act, this Court is inclined to examine the correctness of the exercise of jurisdiction by the second respondent. In the event, the Court comes to the conclusion that there are serious disputed questions of fact involved, then the petitioner would be relegated to avail the remedies under the PVAT Act. On the other hand, if the petitioner is able to establish on the available facts admitted by either side that the third respondent lacks jurisdiction to exercise powers under the PVAT Act in relation to the transaction done by the petitioner, then the existence of an alternative remedy under the PVAT is not a bar for this Court to exercise jurisdiction under Article 226 of the Constitution of India.

14. Before venturing into the factual matrix, it would be necessary to take note of the legal position as to which of the transaction would qualify to be termed as an inter-state sale.

15. In Union Of India & Anr vs K. G. Khosla & Co. (P) Ltd. & Others, AIR 1979 SC 1160, the question arose as to whether the Sales Tax authorities in the Union Territory of Delhi and those in Haryana, as to which of the two authorities can assess the respondent therein to sales tax. Among other things one of the

questions which was considered was as to whether the contract of sale should provide for movement of goods, noting the facts of the said case, it was observed the contract of sale did not require or provide that goods should be moved from Faridabad to Delhi and that it is not true to state that for the purposes of Section 3(a) of the Act, it is necessary that the contract of sale must be itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale.

16. In the case of Tata Iron And Steel Co., vs S.R.Sarkar And Others, AIR 1961 SC 65, it was held that clauses (a) and (b) of Section 3 are mutually exclusive and that Section 3(a) covers sales in which movement of goods from one State to another is the result of a covenant or incidental of contract of sale and the property in goods passes in either State. It was further held that a sale can occasion the movement of goods sold only when terms of the sale provide that the goods would be moved; in other words, a sale occasioned the movement of goods when the contract of sale so provides. After referring to the other decisions on the point, it was held as follows:-

15.....(1) a sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in the goods passes; (2) it is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement; and (3) it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State Movement must be specified in the contract itself.

17. It was further held that in order that a sale may be regarded as an inter-state sale, it is immaterial whether the property in goods passes in one State or another. The question as regards the nature of the sale that is, whether it is an inter-state sale or intra state sale does not depend upon the circumstances as to in which states, the property in the goods passes it may pass in either State and yet the sale can be and inter-state sale.

18. In Sahney Steel and Press Works Ltd., & Anr., vs. CTO & Ors., 1985 (4) SCC 173., one of the questions which was considered is whether a branch office located outside the State would make a difference in the transaction and this question was answered by observing that the branch office merely acted as a conduit through which the goods passed on their way to buyer and

it would have been a different matter, if the particular goods had been despatched by the registered office at Hyderabad to a branch office outside the state for sale in the open market and without reference to any order placed by the buyer (emphasis applied). In such a case, if the goods are purchased from the branch office, it is not a sale under which the goods commenced their movement from Hyderabad. It is a sale, where goods moved merely from the branch office to the buyer and the movement of the goods from the registered office at Hyderabad to branch office outside the State cannot be regarded as an incident of the sale made to the buyer. In the said case, it was held that the sale transaction was an inter-state sale inasmuch as they satisfy the terms of clause (a) of Section 3 of the CST Act.

19. In *Rukmini Mills Ltd vs. The Government of Tamil Nadu*, 1975 (36) STC 425 Mad, a converse case arose where the appellant relied on a weigh bill being drawn in the name of self and contended that the goods could be diverted by the consigner or his depot keeper at his mill and therefore, the sale could not be held to be an interstate sale. While deciding the question, the Hon'ble Division Bench referred to the decisions of the Hon'ble Supreme in the cases of *Tata Engineering & Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes* reported in [1970] 26 S.T.C. 354 (S.C.) and *Kelvinator of India Ltd. v. State of Haryana* reported in [1973] 32 S.T.C. 629 (S.C.) and held as follows:-

6.....It is true that the fact that the goods could be diverted by the consignor before it reaches the out-of-State purchaser is a relevant factor in considering the question whether the transaction is inter-State sale or not, but that fact itself could not be said to be conclusive. In very many cases, in order to safeguard the payment of the price and also in order to avoid any future dispute, the goods might be sent to the consignee as "self" so that the goods could be delivered to the purchaser after payment of the price or could be given on open delivery to the purchaser so that there would not be any dispute thereafter as to the quality or quantity of the goods contracted for. But once we have the evidence to show that the goods moved in pursuance of a contract and was intended to be delivered to the purchaser the transaction becomes an inter-State sale or purchase attracting sales tax under Section 3(a) of the Central Sales Tax Act. We have already noticed that prior to the despatch of the goods there were firm orders by the purchasers and it is only in pursuance of these contracts the goods were despatched

intending to be delivered to the purchasers. All the other steps which were taken in this case were intended to safeguard the prompt payment of the price before delivery of the goods to the out-of-State purchaser which do not in any way affect the nature of the transaction as such. We therefore do not agree with the learned counsel that by reason of the consignee being put as "self", the transaction is taken out of the category of inter-State sales.

20. In *Balabhagas Hulaschand Industries vs. State of Orissa* reported in (1976) 2 SCC 44, the Hon'ble Supreme Court pointed out the conditions that must be satisfied before a sale can be said to take place in the course of inter-state trade or commerce in the following terms:-

15(2) That the following conditions must be satisfied before a sale can be said to take place in the course of inter-State trade or commerce:

(i) that there is an agreement to sell which contains a stipulation express or implied regarding the movement of the goods from one State to another;

(ii) that in pursuance of the said contract the goods in fact move from one State to another; and

(iii) that ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move".

If these conditions are satisfied then by virtue of Section 9 of the Central Sales Tax Act it is the State from which the goods move which will be competent to levy the tax under the provision of the Central Sales Tax Act. This proposition is not, and cannot, be disputed by the learned counsel for the parties.

21. In *Kerala State Small Industries Development and Employment Corporation Ltd., vs. State of Tamil Nadu*, 1999 (113) STC 169, the law governing inter-state sale was explained in the following terms:-

18. The law governing inter-state sales is now fairly well-settled although in the application of law to individual cases

difficulties continued to arise and each case will have to be decided with reference to its own special facts. That movement of the goods across the borders of State is an essential pre-condition, beyond any controversy only a transaction of sale connected with that movement can be regarded as an inter-State sales. The movement and the sale must have a reasonable direct link. Such movement can be stipulated in the contract of sale specifically or it may be contemplated by the parties as an implied term of contract. Even if the movement of the goods is not specified in the contract, and even if it cannot be regarded as an implied term, if such movement is incidental to the contract, then in such case also such transaction would be an inter-State sale. The tax that is levied is on the transaction of sale. The concept of sale itself being an intangible one, where there is no transfer of property in the goods there is no sale, and mere movement cannot be the subject-matter of the taxation, nor can a mere agreement to sell be taxed.

19. The relationship between the movement and the sale should be, very broadly put, be that of effect and cause. The sale should have occasioned the movement or the movement should have been incidental to the sale.

22. In *Indian Oil Corporation Ltd., and Anr., vs. UOI & Ors.*, 1980 Supplementary SCC 426 para 6 & 9, it was held as follows:-

8.....It is obvious that the sales under the agreement are not possible without inter-state movement of naphtha. Clause 3 read with clause 8 also proves that really there are no two movements but only one movement from Barauni to Kanpur pursuant to the contract of sale and the agreement regarding storage facilities provided in clause 8 is only for operational convenience, it is only a mechanism devised to facilitate the transfer of naphtha through the seller's pipeline to their depot at Kanpur and from there to the Buyer's factory at Kanpur through the pipeline constructed at the buyer's cost. It is relevant in this connection to note that under clause 7(ii) the cost of transferring naphtha from Barauni to the buyer's fence is to be borne by the buyer.

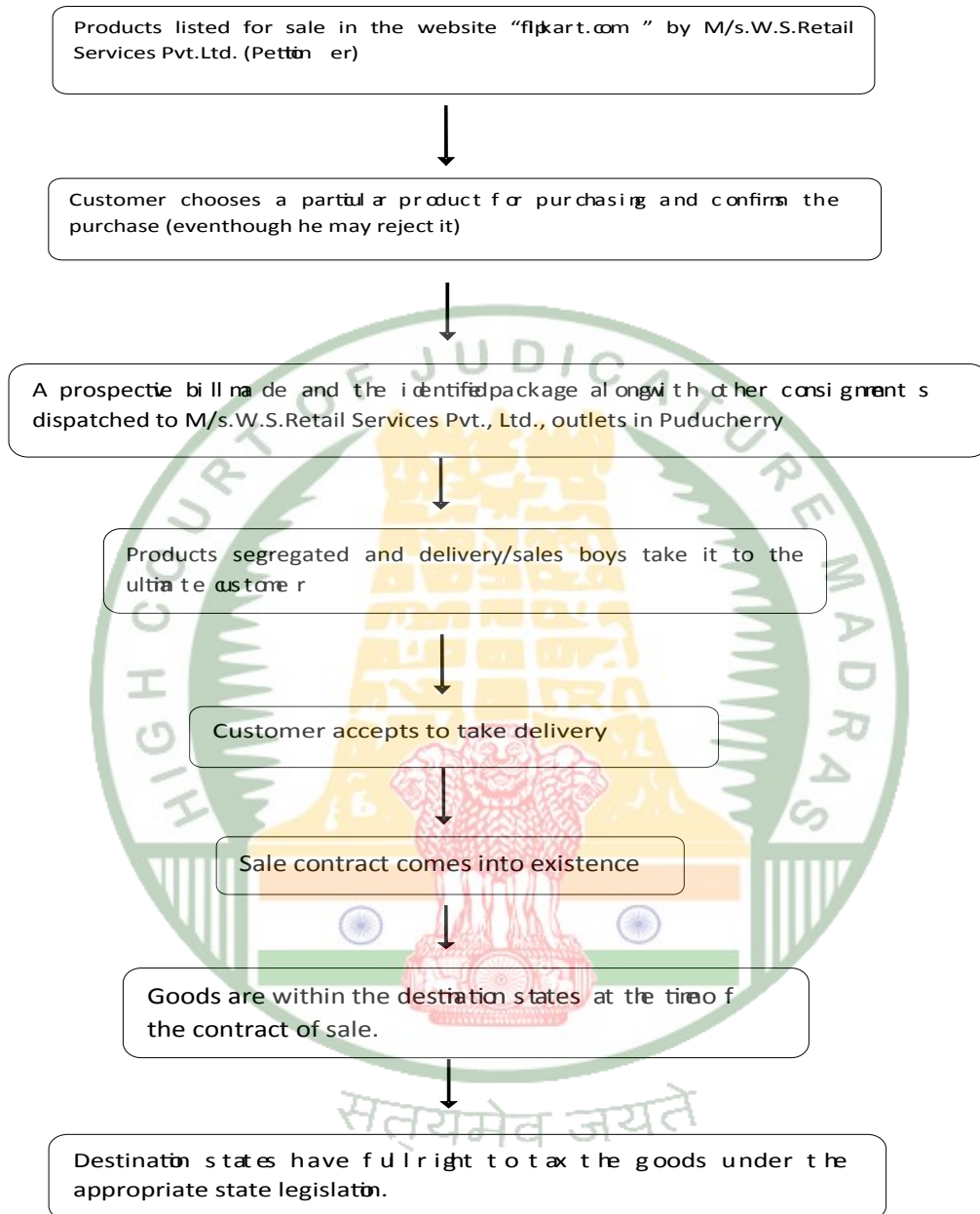
9. Each case turns on its own facts and the question is whether applying the settled principle which we have mentioned above to the facts of the present case the sales can be said to be inter-state sales. An attempt to show that some of the factors present in the instant case are present or absent in some case or other in which this Court held the sale to be a local sale or inter-state sale hardly serves any useful purpose. On the facts of the present case the sales are clearly inter-state sales and the State of U.P. had therefore no jurisdiction to assess the petitioners to sales tax under the State Act. As the movement of naphtha commences from Barauni in Bihar, the sales tax payable on the sales of naphtha under the agreement dated February 9, 1970 can be assessed and collected only by the authorities in the State of Bihar on behalf of the Government of India in view of section 9 of the Central Sales Tax Act.

23. From the above decisions, the legal principle that can be culled out for a transaction to qualify as an inter-state sale are (i) a sale which occasions movement of goods from one state to another state; (ii) it is no matter in which state the property in the goods passes; (iii) it is not necessary that the sale must precede the interstate movement in order that the sale may be deemed to have occasioned such movement; (iv) it is not necessary for a sale to be deemed that there should be a covenant regarding inter-state movement in the contract itself; (v) when there is one interstate movement pursuant to the contract of sale an arrangement regarding storage facility provided in the contract is only an operational convenience, a mechanism devised to facilitate the transfer, when movement of goods commences in a particular State, the sales tax payable on the sales can be assessed and collected only by the authorities in the state where the movement commenced on behalf of the Government of India in view of Section 9 of the CST Act; (vi) when there is no break in the movement of goods and the branch office merely acted as a conduit through which goods passed on their way to the buyer, it is still an inter-state sale; however if particular goods had been despatched by the registered office in a State to the branch office outside the State for sale in the open market without reference to any order placed by the buyer it will not qualify as inter-state sale; (vii) Weigh bill drawn in the name of self, which would enable the consignor to divert the goods at his will, before it reaches the out of state purchaser is a relevant factor in considering the question whether the transaction is the interstate sale or

not, but that fact itself could not be set to be conclusive, this is so because in order to safeguard the payment appraise and avoid dispute, the goods might be sent to the consignee as self so that goods could be delivered to the purchaser after payment appraise or could be given open delivery to rule out any dispute regarding quality or quantity of the goods; (viii) If there is evidence to show that the goods moved in pursuance of a contract and was intended to be delivered to the purchaser, the transaction becomes an interstate sale or purchase attracting sales tax under Section 3(a) of the CST Act; (ix) Every interstate sale must have a situs and the situs may be in one state or another; (x) When the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods irrespective of whether the property in the goods passed in one State or the other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility of tax under Section 3(a) of the Central Act; (xi) It would be enough if the movement was in pursuance of or incidental to the contract of sale; (xii) There must be an agreement to sell, which contains a stipulation express or implied regarding the movement of the goods from one State to another pursuant to a contract, the goods in fact move from one state to another; (xiii) concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move; (xiv) the movement of the sale must have a reasonable and direct link; (xv) movement can be stipulated in the contract of sale specifically or it may be contemplated by the parties as an implied term of contract; even if movement of goods is not specified in the contract and even if it cannot be regarded as an implied term, if such movement is incidental to the contract, then such case also transaction would be an inter-state sale; (xvi) The relationship between the movement and the sale should be, very broadly put, be that of effect and cause and (xvii) the sale should have occasioned the movement or the movement should have been incidental to the same.

24. Bearing the above legal principles in mind, to decide the present controversy, it would be necessary to go into certain facts, which are not in dispute. In other words, these facts are culled out from the show cause notice and the impugned order passed by the third respondent. The transaction which is sought to be taxed under the PVAT Act are transactions, where goods are delivered to the purchaser and payment is made on delivery:-

Flowchart of Transaction when goods are taken delivery



25. The above flowchart is as contained in the impugned order, illustrates the type of transaction done by the petitioner in respect of sales, where payment is effected on delivery. It is not disputed by the Revenue that the products listed for sale or available in the website www.flipkart.com. The customer goes to the online platform and chooses a particular product and confirms the purchase. A bill is generated and the identified package, that is the package

containing the product purchased by the buyer is despatched to Puducherry to the outlet of the petitioner on "self basis". The Revenue seeks to tax the transaction as a local sale by primarily contending that the identified package with the prospective bill along with other consignments are despatched from Karnataka to the petitioner on "self basis". When the consignments reach Puducherry, they are kept in a depot established by the petitioner, which is registered under the provisions of the PVAT Act, as only as a courier service, thereafter, the products are segregated and sales/delivery boys deliver to the ultimate customer at Puducherry, the customer accepts delivery and if effect payments the sale comes into existence. Thus, the focus is on the situs and it is stated that the consideration payable for the goods is paid at Puducherry, when the delivery boy takes the goods from the depot at Puducherry and delivers it to the customer and accepts the cash. Therefore, it is contended that a sale within the State of Puducherry and the destination State has full right to tax the goods under the appropriate State legislation.

26. Thus, it is admitted by the Revenue that the customer approaches the online platform and chooses a product and places a purchase order. On such placement of purchase order, a bill is generated in the name of the purchaser and the identified package is consigned to Puducherry. Thus, the contract comes into existence, the moment the purchaser logs into the online platform chooses and selects the product and confirms the purchase by activating the necessary option in the online portal.

27. The next event is that a bill is generated in the name of the purchaser for the product identified by him. It is this product along with other products of other similar purchases are consigned from the petitioner's warehouse at Karnataka to the petitioner's depot at Puducherry.

28. In the preceding paragraphs, the legal principle to be satisfied for determining as to whether a transaction is an inter-state sale has been culled out. Thus, the primordial test would be that the sale should have occasioned the movement of the goods or the movement should have been incidental to the sale. The Revenue does not dispute the fact that the goods in question at the time when the purchaser exercises his option to purchase it via online platform are the outside the State of Puducherry that is in Karnataka. Thus, but for the option exercised by the purchaser to buy a particular product displayed in the website of the petitioner, the movement would not have occasioned. This observations is made in the light of the facts as mentioned in the impugned assessment order.

29. Another limb of the argument was that the movement of

goods has got nothing to do with the purchaser and there is no contract to the said effect. The law states that the movement and sale must have a reasonable direct link, it can be stipulated in the contract specifically or contemplated by the parties as implied term of contract and even if, it is not specified in the contract and even if, it cannot be regarded as a implied term, if such movement is incidental to the contract, then in such case also, the transaction has been held to be an inter-state sale. In the instant case, the Revenue does not dispute the fact that the movement has occasioned from outside the State. Though it might not have been specifically or impliedly made in the purchase contract or purchase invoice, the movement from the State of Karnataka to Puducherry is incidental to the contract. Thus, the purchase contract or the sale invoice being an agreement to sell, results in the movement of goods from outside Puducherry, which is incidental to the purchase contract and when it is not in dispute that the pursuant to such purchase order, the goods have moved from one State to another, it is undoubtedly an "inter-state sale".

30. The Revenue would contend that the consignment moved from Karnataka to Puducherry on "self basis" that is the consigner was the petitioner and consignee was also the petitioner, the consignment was stored in a depot in Puducherry sorted out delivered to the purchaser and purchase price received. The effect of such weigh bill being drawn as "self basis" was considered by the Hon'ble Division Bench in Rukmini Mills (supra), wherein the Hon'ble Division Bench observed that when a weigh bill is drawn in the name of self, the goods can be diverted by the consigner or its depot keeper, but held that this is not a very relevant factor for considering the question whether transaction is inter-state sale or not. The Court took into consideration that in many cases to safeguard the payment of price and also to avoid future disputes, goods may be sent to the consignee on a "self" basis, so that the goods can be delivered to the purchaser after payment of the purchase price or given open delivery to the purchaser, so that there would not be any dispute thereafter, as to the quality or quantity of the goods contracted for. Therefore, merely because a weigh bill has been drawn in the name of 'self' would not by itself be a reason to disbelieve the nature of transaction and to treat it, as a sale within the State of Puducherry.

31. It was argued by the Revenue that the consignment moves from the State of Karnataka to Puducherry and it is stored in the Depot of the petitioner, where the petitioner admits that they sort out the products and then the products are taken to be delivered to the customers and this activity is stated to be an activity where the petitioner does the sorting and the goods are within the destination of Puducherry and the sale is effected as soon as the delivery boys deliveries the goods to the purchaser

and receives cash. In other words, the presence of a depot is sought to be put against the petitioner and to disbelieve the nature of transaction. The petitioner's explanation is that several orders are placed online and for logistic purpose, they have established a depot, where all the consignments are stored and from there, it is distributed to the purchasers. Further it is stated that there is no transaction done or no sale effected from the state of Puducherry.

32. In *Sahney Steel* (supra), the petitioner company had its registered office and factory at Hyderabad and branch offices in various State, they were all registered as dealers under the CST Act and the respective State Sales Tax Act. The branch offices received orders from customers within and from outside the respective states for supply of goods confirming to definite specifications and advised the registered office at Hyderabad to manufacture the same at their factory and despatch to the branches outside the State of Andhra Pradesh by way of transfer of stock. The goods were booked to self and sent by lorries by the registered office. The branches received the goods and deliver them to the customer raise bills and receive the sale price. The commercial tax officer held that the transaction amounted to inter-state sales of goods. While deciding the question, the Hon'ble Supreme Court pointed out that the manufacture of the goods at Hyderabad factory and the movement thereafter from Hyderabad to the branch office outside the State was a result of a covenant in the contract of sale or an incident of that contract that the goods manufactured at Hyderabad according to the specifications stipulated by the buyer and there was no break in the movement of goods and the branch office merely acted as a conduit through which the goods passed on their way to the buyer, treating it as an "interstate sale". Thus, the presence of the depot at Puducherry can hardly make any difference to the nature of transaction done by the petitioner. In other words, factually the respondents would admit that the purchase effected is for a particular product on exercise of option to purchase, a bill is raised in the name of the purchaser and the identified product (as ordered by the purchaser) is sent to Puducherry. Thus, in my view, the appropriation takes place in the State of Karnataka.

33. Much emphasis was made by the learned Senior counsel for the Revenue to the situs of the Depot namely at Puducherry and elaborate reference was made to the modus operandi adopted by the petitioner from the said Depot. The question would be whether the situs of the said depot would be a relevant factor. In the preceding paragraphs, the Court has held that the purchase contract comes into an effect the moment, a purchaser exercises the option through the online platform to purchase a particular product. The purchase invoice is generated in the name of the purchaser and this purchase occasions in the

movement of the goods, therefore, the situs can be in any either one of the States. The Hon'ble Supreme Court in M/s.Onkarlal Nandla, (supra), held that there is no antithesis between a sale in the course of interstate sale or commerce and the sale inside the State, even in the interstate sale must have a situs and the situs may be in one State or another.

34. The learned Senior counsel for the Revenue referred to the paragraph 12 of the judgment of the Hon'ble Supreme Court in the case of M/s.Keluram Ramkaran vs. State of Orissa (supra), wherein two illustration have been given and case No.2 is referred to as an argument, which will fit the case of the petitioner to hold the transaction as a sale within the State of Puducherry. The said case No.2 is as follows:-

"Case No.II-A, who is a dealer in State X agrees to sell goods to B but he books the goods from State X to State Y in his own name and his agent in State Y receives the goods on behalf of A. Thereafter the goods are delivered to B in State Y and if B accepts them a sale takes place. It will be seen that in this case the movement of goods is neither in pursuance of the agreement to sell nor is the movement occasioned by the Sale. The seller himself takes the goods to State Y and sells and goods there. This is, therefore, purely an internal sale which takes place in State Y and falls beyond the purview of Section 3(a) of the Central Sales Tax Act not being an inter-State sale."

35. The above illustration cannot be applied to the petitioner's transaction for more than one reason. Undisputedly, the purchase order is placed outside the State of Tamil Nadu and the movement of goods has occasioned on account of the purchase. This fact is not disputed by the Revenue as in the flowchart, they have clearly admitted that after the customer chooses a particular product, the bill is raised and the identified package is consigned to Puducherry. In the illustration given, there is no admission to the fact that the movement of goods was pursuant to an agreement to sell nor is the movement occasioned by the sale. In the instant case, there can hardly be any doubt, as the revenue has accepted that the purchase order, which is placed outside the State has occasioned the movement of goods. Thus, the said decision is distinguishable on facts.

36. One more aspect pointed out by the Revenue is with regard to use of incorrect TIN number in the E-Sugam form generated by the petitioner at Karnataka. Admittedly, the form

is electronically generated and unless and until all columns are filled, the computer system will not generate the form. The petitioner's explanation is that the furnishing of TIN number is not required. However, the said column cannot be left blank and the movement of goods are to Puducherry, the first three digits of Puducherry code are mentioned and this is no way amounts to suppression. The explanation given by the petitioner is reasonable considering the facts and the nature of transaction done by the petitioner. The consigner and the consignee is the petitioner and the goods moved from State of Karnataka to Puducherry and it is on "self basis". The consignment is shown as electronic items, garments etc., stored in several bags. Therefore, mere mention of TIN number by giving only the code of Puducherry as assigned by the Commercial Taxes Department that by itself will not be a ground to state that the petitioner has committed an offence.

37. A screen shot of the petitioner's online platform has been produced which further strengthens the case of the petitioner. The platform contains all the relevant details and the purchaser is given the full details including the invoice number, which is in PDF format. The delivery bill number and the shipping details are also furnished. The purchaser is well aware that the shipping of the product is being handled by E-Kart logistic which is a unit of the petitioner handling logistic part of the business and the purchaser is aware about the approximate date of delivery. The cost of shipping the product is separately recovered and mentioned in the platform. Thus, the purchase order contains all the details, which clearly prove that the purchase order has occasioned the movement of goods from the State of Karnataka to Puducherry. The sample copy of the retail invoices/bills raised from Karnataka in the name of the purchaser at Puducherry had been produced, which shows that the petitioner, who is the registered dealer in Karnataka has paid Central Sales Tax at 5.5% for the said product. This also goes to establish that the transaction is an "inter-state sale".

38. The High Court of Kerala in the case of Flipkart Internet and Ors., vs. State of Kerala reported in 2015 TOIL HC Karnataka 2510 was deciding an identical issue in a batch of cases and W.P.No.6916 of 2015 pertaining to the petitioner, whose case is identical to that of the Writ Petitioner, wherein the High Court of Kerala quashed the demand notices for the following reasons:-

As regards W.P.(C).No.6916 of 2015, I find that the notices and orders issued to the petitioner in this Writ Petition are more or less identical to those in W.P.(C).No.5348 of 2015, discussed above. The only difference in the instant case is that the petitioner herein

is a person who actually engages in the business of sale and purchase through an online portal-myntra.com. The petitioner, however, was a registered dealer under the Karnataka Value Added Tax Act during the relevant period, and was paying tax in respect of the local sales and inter-state sales effected from its business premises in the State of Karnataka. There is no material relied upon by the respondents to suggest that the petitioner had effected local sales in Kerala for which he was to register himself as a dealer under the KVAT Act and comply with the other provisions under the said Act that were applicable to dealers. Thus, for the same reasons as already spelt out in this judgment while dealing with W.P.(C). No.5348/2015, I allow W.P.(C).No.6916/2015, by quashing Exts.P11 and P13 orders, P12 and P14 Demand notices, as also Exts.P8 and P9 show cause notices.

39. The learned Senior counsel for the Revenue referred to paragraph 3 of the judgment of the Kerala High Court and pointed out that the Court has recorded that the sales are effected by the petitioner, who are registered sellers on the website. However, this issue is answered in paragraph 10 of the judgment, wherein it is observed that the petitioner is a registered dealer under the Kerala VAT Act and in the returns submitted by them, they had conceded 'NIL' taxable turnover under the Kerala VAT Act on the ground that the entire sales turnover pertained to the interstate sale effected by them. This contention was accepted by the Kerala High Court and it was observed that in the absence of any material to suggest that the returns filed by the petitioner were rejected by the Revenue authorities (under Kerala VAT Act), the Revenue authorities cannot proceed to levy tax or impose penalty on the petitioner in respect of the same turnover.

40. Thus, for all the above reasons, and in the light of the admitted facts, which this Court has elaborated in the preceding paragraphs, it is held that the transactions done by the petitioner are "inter-state sales" and the order impugned in the Writ Petition is not sustainable and liable to be set aside.

41. In the result, the Writ Petition is allowed and the impugned order is quashed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

pbn

To

- 1.The Secretary,
Union of India, Ministry of Finance,
North Block,
New Delhi - 110 001.
- 2.The Commissioner of Commercial Taxes,
Union Territory of Puducherry,
First Floor, 100 feet Road,
Ellapillaichavady, Puducherry - 605 005.
- 3.The Commercial Tax Officer-I,
2nd Floor, Room No.31,
100 feet Road, Ellapillaichavady,
Puducherry - 605 005.
- 4.The Deputy Commercial Tax Officer (Intelligence Wing),
2nd Floor, Room No.31,
100 feet Road, Ellapillaichavady,
Puducherry - 605 005.
- 5.The Assistant Commissioner of Commercial Taxes
LVO-015, Vanijya Therigekaryalaya -2,
Rajendranagara, Koramangala,
Bangalore - 560047, Karnataka.
- 6.The Sales Tax Officer,
8th Floor, E Wing,
New Vikrikarbhavan,
Old Nesbit Road,
Sardarbalwant Singh Dhodhi Marg,
New Dockyard & Byculia Railway Station,
Mazgaon, Mumbai - 400010 (Maharashtra)

7.The Value Added Tax Officer,
KCS Branch
11th Floor Sales Tax Building,
Delhi - 110 002.

8.The Excise and Taxation Officer,
Taxation Building,
Hero Honda Chowk,
Gurgaon - 122 001 (Haryana)

9.The Joint Commissioner (Sales Tax),
Barasat Charge, 82/5, KNC Road,
Barasat, 24 Prgs (North),
Kolkata - 700 124 (West Bengal)

10.The Deputy Commissioner,
Khand-7, Commercial Tax Department,
Commercial Tax Building, Collectorate,
RDC, Raj Nagar, Ghaziabad - 201002.
Uttar Pradesh.

+1 cc to Mr.K.Magesh Advocate sr 71530
+1 cc to Government Pleader sr 71584
+2 ccs to Special Government pleader Taxes
sr 71997 & 71608

W.P.No.3442 of 2016

aa02/01/2017

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